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AUG 30 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 236.

JOHN T. CLARKE,

Petitioner,

—against—

BARCLAY PARK CORPORATION, BARCLAY HOTEL CORPORATION, JOHN F. KROPPY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RUSSELL C. MACFALL,
Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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Preliminary Statement.

The respondents, Lester S. Abberley, Edward D. Bryde, Arthur H. Amon and Russell C. MacFall, copartners doing business as Abberley, Bryde, MacFall & Amon, A. Joseph Geist, George E. Netter and Morris A. Marks, copartners doing business as Geist & Netter, William Netter and Robert Netter, copartners doing business as Netter & Netter, Charles D. Hoffman and Samuel Hoffman, copartners doing business as Hoffman & Hoffman, John F. Kroppy, and A. David Benjamin, doing business as Benjamin

& Benjamin, all attorneys who rendered services in connection with the reorganization of Barclay Park Corporation, Debtor, and William J. Wallis oppose the issuance of a writ of certiorari to review two orders of the Circuit Court of Appeals for the Second Circuit entered in the above cause on February 7, 1941 and February 25, 1941, which denied petitioner's motion for leave to appeal to said Circuit Court of Appeals under Section 250 of the Chandler Act and dismissed petitioner's appeal theretofore taken under said section of the Chandler Act.

There was no opinion rendered in the Circuit Court of Appeals in connection with said orders. The decisions of the Court below are not reported.

Statement of the Case.

The question here presented is whether there was an abuse of discretion on the part of the Circuit Court of Appeals in denying petitioner's motion for leave to appeal from that part of an order made by the United States District Court for the Southern District of New York on August 19, 1939 making allowances for services rendered in the matter of Barclay Park Corporation, Debtor, to the respondents and in dismissing the appeal theretofore taken by the petitioner from said order.

On September 25, 1939 petitioner herein filed a notice of appeal from the said order of the District Court dated August 19, 1939. Said appeal has never been perfected nor brought on for argument. On October 7, 1940 the respondents moved on notice for an order dismissing said appeal theretofore taken by the petitioner from said order. This motion was adjourned from time to time pending the decision of this Court in *Reconstruction Finance Corp.* v.

Prudence Securities Advisory Group, 85 Law. Ed. 300, 61 Sup. Ct. 331. After the decision of this Court in the *Prudence* case, *supra,* and on February 3, 1941 the petitioner herein moved on notice for leave to appeal.

The Circuit Court of Appeals denied the motion for leave to appeal and granted the motion to dismiss the appeal. Petitioner now seeks a writ of certiorari to review said orders of the Circuit Court of Appeals.

Reasons for Denial of a Writ of Certiorari.

1. The Circuit Court of Appeals having before it the determination of this Court in the *Prudence* case, *supra,* denied the application made by petitioner to the said Circuit Court for leave to appeal in the sound exercise of its discretion and under the authority of said case, and the dismissal of the appeal necessarily followed the refusal of the Circuit Court to grant leave to appeal under all the circumstances.

2. The record amply discloses that the Circuit Court of Appeals was fully justified in so exercising its discretion and in denying the application made by the petitioner for leave to appeal and dismissing said appeal.

Argument.

Summary of the Argument.

POINT I—The Circuit Court of Appeals having before it the decision of this Court and the rule laid down in *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group, supra,* gave due consideration to petitioner's motion for leave to appeal

and in the sound exercise of its discretion, in accordance with said rule, denied petitioner's application for leave to appeal and dismissed petitioner's appeal.

POINT II—The Circuit Court of Appeals was justified by the record in deciding that petitioner's motion for leave to appeal should be denied and the motion to dismiss his appeal should be granted.

POINT III—The petition for a writ of certiorari should be denied.

POINT I.

The Circuit Court of Appeals having before it the decision of this Court and the rule laid down in *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group, supra,* gave due consideration to petitioner's motion for leave to appeal and in the sound exercise of its discretion, in accordance with said rule, denied petitioner's application for leave to appeal and dismissed petitioner's appeal.

The petitioner's application purports to be predicated upon the circumstances of the *Prudence* case, *supra*. There is no parallel between this situation and that which the Court passed upon there. In this instance, application for leave to appeal was addressed to the Circuit Court and the Circuit Court having before it the determination of this Court in the *Prudence* case, *supra*, and after giving due consideration to all of the facts and circumstances surrounding this case as set forth in the record on appeal, denied the application made by the petitioner to the said Circuit Court for leave to appeal in the sound exer-

cise of its discretion under the authority of said case and the dismissal of the appeal necessarily followed the refusal of the Circuit Court to grant leave to appeal under all of the circumstances.

POINT II.

The Circuit Court of Appeals was justified by the record in deciding that petitioner's motion for leave to appeal should be denied and a motion to dismiss his appeal should be granted.

The record amply discloses the many factors which unquestionably influenced the Circuit Court in so exercising its discretion. The standing of the petitioner in the case has been fully discussed in the affidavits contained in the record. The reorganization of Barclay Park Corporation was pending in the United States District Court for the Southern District of New York for a number of years and was a complicated and difficult proceeding. On August 19, 1939 the said Court, after careful consideration, granted certain allowances to the respondents herein. The petitioner now desires to appeal from that order to the Circuit Court of Appeals, Second Circuit (fols. 33-35). The motivating factors for the activity of the petitioner in connection with this application are easily discernible from the record.

Petitioner's own application for allowances was denied by the District Court upon the merits upon the ground of the general impropriety of this petitioner's conduct and for the reason that while declaring himself to be a fiduciary of the so-called "Bondholders' Committee", the petitioner was in truth and in fact a speculator in the securities of the Debtor (fol. 36).

The petitioner's own appeal from the District Court order denying any allowance to him is still pending, and if he is entitled to any relief, it may be afforded him on that appeal (fol. 51). While the petitioner claims that he is a substantial bondholder of the Debtor and is chairman of the so-called "New Bondholders' Protective Committee", he does not state how many bonds he holds, or when he acquired them, nor does he say who constitutes the "New Bondholders' Protective Committee", how that committee came into being, or how many bonds it represents (fol. 51).

The order of the United States District Court, Southern District of New York, from which the petitioner seeks to appeal was made on August 19, 1939 and petitioner's notice of appeal from said order was filed on September 25, 1939. At that time there was in effect the holding of the Circuit Court that such an appeal could be taken as a matter of right,—*London* v. *O'Dougherty*, 102 Fed. (2d) 524.

On March 11, 1940 this Court decided that such an appeal could not be had as a matter of right but only within the discretion of the Circuit Court of Appeals—*Dickinson Industrial Site* v. *Cowan*, 302 U. S. 382, 84 Law. Ed. 819, 60 Sup. Ct. 595.

The failure of petitioner herein to proceed with his said appeal during the period of approximately six months between the filing of his notice of appeal and the decision of this Court in the *Dickinson* case, *supra*, is not in any way excused. Except for an *ex parte* application for leave to appeal, which was made and denied on March 21, 1940 (fol. 10), petitioner did nothing to perfect or bring on his appeal until January 29, 1941, when he moved on notice for leave to appeal. That was after a motion had

been made to dismiss his appeal (fol. 10) and after this Court had decided the *Prudence* case, *supra*.

Said motion for leave to appeal was made more than seventeen months after the order of the District Court from which petitioner desired to appeal. The allowances granted by the District Court by the order of August 19, 1939 were properly paid out pursuant to that order in August, 1939 (fols. 50-51). No stay was at any time asked for or granted (fol. 50). The notice of appeal was not filed until September 25, 1939, after the allowances had been paid out (fol. 51).

This case is obviously quite different from the *Prudence* case, *supra*, where appellant in good faith diligently prosecuted the appeals and brought them on for argument. This Court there said:

> "In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals."

In the instant case the good faith of petitioner is seriously impeached on the record (fols. 35-59). That he was guilty of laches is apparent. Furthermore, his intended appeal from the order granting allowances is without merit.

POINT III.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RUSSELL C. MACFALL,
Counsel for Respondents.